Aikpoint Development Sdn Bhd v Gemencheh Enterprises Sdn Bhd

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24NCVC-209–12 OF 2011
ABDUL KARIM JC
14 DECEMBER 2012

Land Law — Compulsory acquisition — Compensation payable — Whether acquisition monies payable to registered owner or to intending buyer of land — Whether at time of acquisition registered owner divested itself of beneficial interest in land — Whether at time of acquisition intending buyer had fully paid purchase price and received duly executed and registrable transfer from land owner

The issue in this case was whether compensation for the compulsory acquisition of part of the applicant's land ('the land') was payable to the applicant ('Aikpoint') or to the intervenor ('Gemencheh') which had obtained an earlier ruling from court that it was the beneficial owner of the land. Ten years before the land was acquired, Gemencheh had agreed to buy the land from Aikpoint and had paid a 10% deposit towards the purchase. However, after the parties had agreed to the terms of the sale and purchase and fair copies of the sale and purchase agreement ('SPA') were sent to Aikpoint for execution, Aikpoint refused to execute and informed Gemencheh that it was no longer interested in proceeding with the transaction. In its suit against Aikpoint in the High Court, Gemencheh obtained an order that the SPA be specifically performed; that Gemencheh was the beneficial owner of the land and that Aikpoint held the land as trustee for Gemencheh. This decision was upheld by the Court of Appeal and Aikpoint's leave to appeal to the Federal Court against the Court of Appeal's decision was refused. When Aikpoint refused to comply with the High Court's ruling, Gemenchech obtained a further order enabling the deputy registrar of the court to execute all documents on Aikpoint's behalf to facilitate the transfer of the land to Gemencheh. Meanwhile, unknown to Gemencheh, part of the land had been compulsorily acquired by the government and the acquisition sum was deposited into court because Gemencheh had lodged a caveat on the land. In the instant application, Aikpoint applied for the acquisition monies to be released to it arguing that at the time of the acquisition Aikpoint was the registered and beneficial owner of the land and Gemencheh had neither paid the full purchase price for it nor had Gemencheh received from Aikpoint a duly executed, valid and registrable transfer of the land in due form.

Held, allowing the application with costs of RM1,000:

(1) The acquisition sum belonged and should be paid to Aikpoint which was the registered and beneficial owner of the land at the time of the acquisition (see para 12).

(2) It could not be disputed that at the time of the acquisition the contractual event had not been fully completed yet. Gemencheh had just paid the 10% deposit towards the purchase price before trouble started to brew. Aikpoint had not divested itself of the beneficial interest in the land at the time of the acquisition. Although the High Court had pronounced Gemencheh to be the beneficial owner of the land, such order had no effect by virtue of the decision of the Federal Court in *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2004] 4 CLJ 89 (see para 12).

[Bahasa Malaysia summary

Isu di dalam kes ini adalah sama ada pampasan untuk pengambilan secara paksa sebahagian tanah pemohon ('tanah') boleh dibayar kepada pemohon ('Aikpoint') atau kepada pencelah ('Gemencheh') yang mana memperlolehi perintah daripada mahkamah bahawa ia adalah pemilik benefisiari tanah tersebut. Sepuluh tahun sebelum tanah diperolehi, Gemencheh telah bersetuju membeli tanah tersebut daripada Aikpoint dan membayar deposit 10% kepada pembelian. Walau bagaimanapun, selepas pihak-pihak bersetuju kepada terma jualan dan pembelian dan salinan perjanjian jual dan beli ('SPA') dihantar kepada Aikpoint untuk pelaksanaan, Aikpoint menolak daripada melaksanakan dan memberitahu Gemencheh yang ia tidak lagi berminat dalam meneruskan dengan transaksi tersebut. Dalam guamannya terhadap Aikpoint di Mahkamah Tinggi, Gemencheh memerlukan perintah bahawa SPA dilaksanakan secara khususnya; bahawa Gemencheh adalah pemilik benefisiari tanah tersebut dan bahawa Aikpoint memegang tanah tersebut sebagai pemegang amanah untuk Gemencheh. Keputusan ini disahkan oleh Mahkamah Rayuan dan izin untuk merayu Aikpoint ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan ditolak. Apabila Aikpoint menolak daripada mematuhi dengan perintah Mahkamah Tinggi, Gemenchech memperolehi perintah selanjutnya membolehkan timbalan pendaftar mahkamah melaksanakan kesemua dokumen bagi pihak Aikpoint untuk memudahkan pemindahan tanah tersebut kepada Gemencheh. Sementara itu, tanpa pengetahuan Gemencheh, sebahagian tanah tersebut telah didambil secara paksa oleh kerajaan dan jumlah pengambilan didepositkan ke dalam mahkamah kerana Gemencheh telah memasukkan kaveat ke atas tanah tersebut. Dalam permohonan ini, Aikpoint memohon untuk wang pengambilan dibayar kepadanya berhujah bahawa pada masa pengambilan tersebut Aikpoint adalah pemilik berdaftar dan benefisiari tanah tersebut dan Gemencheh tidak membayar harga pembelian penuh untuknya ataupun Gemencheh menerima daripada Aikpoint pelaksanaan, pemindahan tanah yang sah dan boleh didaftarkan dalam borang.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM1,000:

(1) Jumlah wang pengambilan dimiliki dan patut dibayar kepada Aikpoint

yang mana adalah pemilik berdaftar dan benefisiari tanah tersebut pada masa pengambilan tersebut (lihat perenggan 12).

(2) Ia tidak dapat dipertikaikan bahawa pada masa pengambilan pelaksanaan kontrak belum selesai. Gemencheh baru sahaja membayar deposit 100% kepada harga pembelian sebelum masalah mula bergolak. Aikpoint tidak melupuskan kepentingan benefisiarinya ke atas tanah tersebut pada masa pengambilan tersebut. Walaupun Mahkamah Tinggi telah mengesahkan Gemencheh sebagai pemilik benefisiari tanah tersebut, perintah sedemikian tidak berkesan mengikut keputusan Mahkamah Persekutuan di dalam kes *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2004] 4 CLJ 89 (lihat perenggan 12).]

Notes

For a case on compensation payable, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2983.

Cases referred to

Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd [2000] 1 MLJ 507, HC (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Lysaght v Edwards (1876) 2 Ch D 499, Ch D (refd)

Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (folld)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd [2004] 4 CLJ 89, FC (folld)

Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd [2002] 3 MLJ 143; [2002] 3 CLJ 409, CA (refd)

Legislation referred to

Land Acquisition Act 1960 s 22, Form K

Wong Kim Fatt (Lawrence Tan Boon Twee with him) (Yong Chen Lim & Saridah) for the applicant.

Sugandra Rao Naidu (SK Khoo & Associates) for the intervener.

Abdul Karim JC:

[1] In this originating summons ('OS'), Aikpoint Development Sdn Bhd, the applicants, pray that the sum amounting to RM340,000 (the acquisition sum) which was paid as compensation towards the compulsory acquisition of land by the government on 18 August 2009 against part of Lot 406, Geran No

4438, Mukim Selandar, Daerah Jasin, Negeri Melaka (now known as Lot 4896, Geran No 52770, Mukim Selandar, Daerah Jasin, Negeri Melaka) ('the concerned land') be released to them as the registered and beneficial owners of the land.

[2] The OS was originally filed by the applicants on 23 December 2011 as an ex parte application (encl 1).

[3] Gemencheh Enterprises Sdn Bhd, the interveners, who have a long and chequered history with the applicants over the concerned land, however, had no knowledge of this OS until they stumbled upon it by accident. They promptly applied to intervene and by order dated 26 June 2012 they were made a party to this proceeding. The intervener strongly opposed the applicants' application and claim that the acquisition sum should be released to them instead because their beneficial ownership status on the concerned land had been determined by the Melaka High Court on 20 October 2005.

[4] Hence, the sole issue for the determination of this court is — who is entitled to the acquisition sum?

[5] To appreciate the reasoning that follows, it is pertinent to provide a brief historical background of the events leading to the present dispute. Stripped to essentials, the facts are as follows:

(a) the applicants are the registered owners of Lot 406, Geran No 4438, Mukim Selandar, Daerah Jasin, Negeri Melaka (now known as Lot 4896, Geran No 52770, Mukim Selandar, Daerah Jasin, Negeri Melaka);

(b) on 20–21 April 1999 the applicants and the interveners had agreed on the sale and purchase of the concerned land at the purchase price of RM906,750. The interveners had paid a 10% deposit for the purchase of the land amounting to RM90,675 and claimed that the deposit is still in the possession of the applicants;

(c) on 8 May 1999, the applicants through their solicitors had not raised any objection pertaining to the draft sale and purchase agreement and had indeed requested for fair copies of the sale and purchase agreement for execution;

(d) on 11 May 1999, the interveners' solicitors had surrendered four fair copies of the sale and purchase agreement duly signed by the intervener to the applicants' solicitors for the execution of the applicants;

(e) on 3 July 1999 the applicants through their solicitors had informed the interveners' solicitors that the applicants no longer wished to execute the fair copies of the sale and purchase agreement and returned the 10%

deposit of the purchase price to the interveners' solicitors. To date however, the interveners claim that the 10% deposit still remains with the applicants;

(f) on 22 February 2000 the interveners filed Civil Suit No 22–21 of 2000 against the applicants applying for specific performance of the sale and purchase agreement;

(g) on 20 October 2005 and upon completion of the full trial, the Melaka High Court (YA Low Hop Bing J, as he then was) held, inter alia, an order for specific performance of the fair copy of the sale and purchase agreement entered into between the applicants and the interveners; that the interveners were the beneficial owners of the land, and the applicants as a trustee for the interveners with regard to the concerned land;

(h) on 4 February 2010 the Court of Appeal dismissed the applicants' appeal and affirmed the High Court Order dated 20 October 2005;

(i) on 28 June 2010 the Federal Court dismissed the applicants' application for leave to appeal to the Federal Court;

(j) on 21 July 2010, 29 July 2010 and 6 August 2010, and despite the court orders directing specific performance of the fair copy of the sale and purchase agreement and repeated letters by the interveners' solicitors, the applicants failed to sign and execute the fair copies of the sale and purchase agreement;

(k) on 6 September 2011 the interveners filed an application via Originating Summons No 24NCVC-05–09 of 2011 to obtain a 'Consequential Orders' in order to give effect to the specific performance order due to the applicants' failure to comply with the court orders;

(l) on 10 October 2011 the Melaka High Court allowed the interveners' application for consequential orders to give effect to the specific performance order;

(m) on 15 December 2011 the High Court rejected the applicants' application for a stay of execution pending the Court of Appeal's decision;

(n) on 16 February 2012 the Court of Appeal struck out the applicants' appeal against the High Court decision on 10 October 2011;

(o) however, and not within the knowledge of the interveners, on 18 August 2009 part of the concerned land was acquired by the government and the relevant Form K under s 22 of the Land Acquisition Act 1960 was duly given to the applicants; and

(p) on 16 July 2009 the compensation award in the amount of RM340,000

was paid by the government to the applicants but was deposited into court due to the existence of a caveat lodged by the interveners.

[6] The applicants contend that they are the rightful recipient of the acquisition sum since they are still the registered and beneficial owners of the concerned land at the time when the acquisition was made on 18 August 2009. The applicants further argue that the interveners were not the beneficial owners of the land because they had not, at any point of time, paid the purchase price in full and the applicants has not given the interveners a duly executed, valid and registrable transfer of the land in due form. In support of the aforesaid contentions, the applicants rely on two Federal Court decisions in *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2004] 4 CLJ 89, and *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561.

[7] As earlier alluded, the interveners however disagree with the applicants' contention. They cry for justice! Learned counsel for the interveners argue that the interveners had done all that was necessary to confer upon them the status of beneficial owners of the concerned land. It cannot be gainsaid that upon the applicants' breach of contract, the interveners had initiated a civil action for specific performance of the said contract. On 20 October 2005, the learned High Court judge (YA Low Hop Bing J, as he then was) had clearly allowed and ordered, inter alia: for the specific performance of the sale and purchase agreement; and, the interveners will have a lien over the concerned land. Learned High Court judge also held that the applicants (the defendant there) was to hold the said land as a trustee for the interveners. The applicants' appeals to the Court of Appeal and Federal Court were dismissed. Despite such orders, the applicants persistently failed and refused to comply and this had precipitated the launching of another civil action in the High Court at Malacca for a 'consequential orders' in order to give effect to the above orders. The interveners, in the upshot, argue that they had acquired the beneficial ownership in the said land since 20 October 2010. Learned counsel for the interveners cited the following cases as authorities for their claim viz *Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd* [2000] 1 MLJ 507 (HC), and *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2002] 3 MLJ 143; [2002] 3 CLJ 409, (CA). Hence, it is submitted that the said acquisition sum justifiably should be rightfully paid to them.

[8] Dr Wong Kim Fatt, the learned leading counsel for the applicants, submits that the resolution of this issue depends entirely on the view this court takes on the above two Federal Court decisions on when a person, in a sale and purchase of land, acquires a beneficial ownership in the land. If this court

accepts the decision, the acquisition sum should be paid to the applicant, but if otherwise, it should go to the intervener. Short and sharp indeed! A quintessence of professionalism!

[9] On the decision of the Federal Court, it cannot be gainsaid that I am bound with it. However, the pertinent question is whether the principles expounded therein apply here? In the Federal Court case of *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2004] 4 CLJ 89, where the facts are not quite dissimilar with the present case, the appellants, the registered and beneficial owners of a piece of land, entered into a sale and purchase agreement with the respondents. On 11 October 1988 all terms and conditions were agreed. Dispute, however, then arose as to the transfer of the land to the respondents culminating in the respondents initiating a suit claiming among others for specific performance and damages for breach of contract. The High Court dismissed the suit. The respondents appealed to the Court of Appeal which unanimously allowed the appeal holding among others that there was a valid contract concluded and a breach thereof. It was further ordered that the matter be sent back to the High Court for specific performance and completion of the contract. On 1 July 1999, the appellants' appeal to the Federal Court was dismissed.

[10] Pursuant to the order of the Federal Court, the respondents made an application to the High Court by way of summons in chambers for specific performance and completion of the contract. It was during this application that the issue which is relevant to the present case surfaced. It transpired that, after a search was done, a small part of the land viz 1200 square metres out of the total area of 9377 square metres, was acquired by the government in 1997. The compensation paid was RM5,252,738.20. The respondent contended the compensation money should go towards the purchase price and be deducted accordingly from the agreed purchase price of RM5,551,370. The appellant resisted saying that the respondent had no rights or had not acquired rights in relation to the compensation money. As in the present case, that dispute became the main issue before the court.

[11] The issue permeates at all level of courts culminating in the powerful statement of principles by the Federal Court. The High Court agreed with the respondents' contention and this decision was affirmed by the Court of Appeal. The Court of Appeal premised its decision of the beneficial ownership of the said land at the material time of the acquisition on the principles of law laid out in *Lysaght v Edwards* (1876) 2 Ch D 499 which was subsequently applied by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45. On appeal to the Federal Court, however, both decisions of the High Court and Court of Appeal were reversed. The Federal Court, after considering the Federal Court case of *Borneo Housing Mortgage*

Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, accepted the following decision of Edgar Joseph Jr FCJ as representing the correct law:

> In our view, *the contractual events* which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, *is on completion*, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

And, upon applying it to the facts of the case under appeal says:

> Against the backdrop of the case of *Borneo Housing Mortgage Finance Bhd* the contractual events at hand have to be examined. From the evidence before us we find that a duly executed valid and registrable transfer of the land in favour of the respondents *had yet to be performed* at the *stage of the acquisition of land*. For this reason the appellant had not divested themselves of the beneficial interest in the said land at the time of acquisition. Hence the compensation for the acquisition rightfully belongs to the appellants (per Pajan Singh Gill FCJ at p 98).

[12] Coming back to the present case at hand, it is clear beyond doubt that the above principle of law is applicable here. It could not be disputed that at the time of the acquisition of that part of the concerned land on 18 August 2009, as in the *Wong*'s case, the contractual event had not fully completed yet. They had just paid the 10% deposit towards the purchase price before trouble started to brew. The applicants had not divested themselves of the beneficial interest in the said land at the time of acquisition. Although the High Court had pronounced on the beneficial ownership of the concerned land via the order dated 20 October 2005, such order has no effect by virtue of the decision of the Federal Court in the *Wong*'s case. On that score, the interveners' counsel reliant on the High Court's and Court of Appeal's decisions in the *Wong*'s case collapses. Being bound by the above Federal Court's decision, I therefore find that the acquisition sum belongs and should be paid to the applicants, who were the registered and beneficial owners of the concerned land at the time of the acquisition.

[13] However, all is not lost to the interveners. In this regard, the interveners do apply, in alternative, if their main claim fails, for other reliefs if the court deems it fit in the special circumstances of this episode with the applicants. It is to be noted that they have been pursuing to complete the contract for about twelve years and it would be unfair to them, upon full completion of the contract, to pay the full purchase price without factoring into consideration the above acquisition sum and the entitlement thereof as announced by this court earlier. The applicants, understandably, oppose this approach as something that was not specifically pleaded for by the interveners. Giving effect to the

interveners' prayer for other reliefs as the court deemed fit as mentioned in the topical sentence of this paragraph, I overrule the applicants' concern forthwith (*Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679 followed). I find support for the stance that I had taken in the following decision of the *Wong*'s case where the Federal Court says at pp 100–101:

> DO WE THEN PROCEED TO DETERMINE WHAT IS IN FACT THE REASONABLE PRICE TO BE PAID BY RESPONDENTS AT THIS STAGE TO COMPLETE THE SALE?
>
> We are of the view that based on the chronology of events and set of facts on record, that this is a fit and proper case wherein our duties should be not cease merely in allowing the appeal and remitting the case to the court below to compute the sum to be paid by the respondents to the appellants to complete the sale. The completion is basically a simple arithmetic calculation, but it may lead to further prolongation of proceedings if not attended to by us now. This entire episode has been through a tedious and expensive legal process. Justice demands no further delay and expense.
>
> WHAT THEN WOULD BE FAIR LINES IN THIS CASE?
>
> The sale of the land involved in the contract was 100,934 sqft and the sale price was RM55 per sqft. However, 13,131.95 sqft was acquired, leaving a balance of 87,802.05 sqft. The sale price of this portion of land at RM55 per sqft as stated in the contract would amount to RM4,829,112.75. Ergo, the respondents are to pay the sum of RM4, 829,112.07 to the appellants for the remaining portion of land sold.

[14] Before I conclude, there is, however, one interesting issue arising from the Federal Court *Wong*'s case. It is to be noted that the principle in both the *Borneo*'s and *Wong*'s cases contains two important phrases having critical implications namely 'contractual event' and 'on completion'. By those phrases, does it mean that the principle only applies in a simple and straight forward case of sale and purchase of land? Or, is it a principle of a general application, a major premise for a deductible logical argument on this issue? Does it apply in cases where there are total non-compliance and refusal to complete the contractual obligations, and where the completion of the said contractual obligation is forced upon the vendor by the order of courts particularly in cases involving order for specific performance of the contract? I would say that the phrase 'on completion' does cover the above situation, that is to say, the application of a general principle in a general situation, albeit by order of courts. In such a case where specific performance was ordered and the contract was completed by force of law for the transfer of the land, the purchaser will acquire the beneficial ownership in the land and the vendor, a bare trustee. The vendor must, as a matter of law, be considered as having divested its beneficial interest in the land. Alternatively, if I am wrong here, the completion of the contract via specific performance, being an equitable remedy, falls as an exception to the above general principle the effect of which will be the same.

[15] The above analysis has paramount implication on the interveners' position. From the historical factual background of the case the interveners had diligently taken all necessary actions to conclude the contract including the obtainment of the consequential orders from the court on 10 October 2011 to give effect to the earlier order for specific performance. In the course of the hearing of this application, learned counsel for the interveners had indicated that the full purchase price had been paid in full, albeit to the interveners' solicitors, and that the necessary due form for the transfer and registration of the concerned land had been duly executed by the deputy registrar of the court as directed in the said consequential orders. The registration, however, was not successfully executed due to the existence of a private caveat lodged by one Hock Seng Mining Sdn Bhd (a subject matter of another application, *Saman Pemula* No 24NCVC251–5/2–12, where the caveat was successfully uplifted by the order of this court on the 28 November 2012, which was heard together with the present application). Having regard to the view that I had taken as to the scope and application of the above general principle, and upon the effective full compliance of the court consequential orders, it is my considered view that the interveners had acquired the beneficial ownership in the land and that the applicants, a bare trustee.

[16] In the upshot, I would allow this application (encl 1) with cost of RM1,000 to the applicants.

Application allowed with costs of RM1,000.

Reported by Ashok Kumar